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Environmental Protection Agency
Water Docket
Mail Code 2822T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: **Comments on the U.S. Environmental Protection Agency's and U.S. Army Corps of Engineers' Proposed Rule to Define "Waters of the United States" Under the Clean Water Act, Docket ID No. EPA-HQ-OW-2011-0880**

To Whom it May Concern:

The Utah Farm Bureau Federation submits these comments in response to the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) proposed rule to define "Waters of the United States" (WOTUS) under the Clean Water Act (CWA).

EPA and the Corps (together, the agencies) are soliciting comments on a proposed rule that redefines "waters of the United States" under all CWA programs. The proposed regulation broadens the scope of CWA jurisdiction beyond constitutional and statutory limits established by Congress and recognized by the United States Supreme Court. In addition to raising serious legal issues, the proposed rule fails to provide clarity or predictability and raises practical concerns with regard to how the rule will be implemented. The proposed rule will result in duplicative and incongruent regulatory requirements that are inconsistent with the purpose and structure of the Act and have not been adequately considered by the agencies. These comments identify practical problems with the proposed rule for Utah Farm Bureau members and we request that the agencies withdraw the proposed rule and in the future consult with the state and stakeholders, including Farm Bureau, and work with the states and stakeholders to address important water quality matters without finalizing this overreaching regulatory proposal.

Utah Farm Bureau Federation is the largest general farm and ranch organization in the state of Utah. Farmers and ranchers are the foundation of Utah's food and agriculture industry which is a major contributor to the state's economic health and well-being generating billions of dollars in economic activity and providing jobs to tens of thousands of Utah citizens. Utah farm gate sales in 2013 exceeded $1.7 billion. According to Utah State University researchers, food and agriculture's forward and backward linkages to transportation, processing, packaging and more makes it the catalyst for $17.5 billion in economic activity. Food and agriculture makes up more than 14 percent of the state GDP and provides 80,000 jobs.

Utah Farm Bureau annual policy comes from members located across Utah. Policy adopted in November 2013 calls on the federal government to honor state control of water rights, recognize that Congress through several Acts including the Ditch Act of 1866, the

McCarran Amendment of 1952 and the Federal Land Policy Management Act of 1976 conveys and recognizes the state's sovereign rights as related to water. Utah Farm Bureau policy calls on federal agencies to recognize and honor the division of powers as prescribed under the Founders' "Federalism" ideals and allow Utah to address water quality issues as delegated by the EPA. Utah has been granted primacy over regulating water quality matters and charged with implementing programs to achieve federal standards. The proposed rulemaking undermines those rights and obligations.

EPA Administrator Gina McCarthy has said concerns voiced by the agriculture community regarding the proposed rule are "ludicrous" specifically noting in AgWeek (July 14, 2012) that "the bottom line with this proposed rule is that if you weren't supposed to get a permit, you don't need to get one now." The concerns of the agriculture community and Utah Farm Bureau are legitimate and any federal agency that proposes rules and suggests that permitting and/or approval processes are not part of the regulatory outcome is just plain not being truthful.

The scope of CWA jurisdiction is of fundamental importance to Utah Farm Bureau. Farm Bureau members engage in activities on land and in utilizing water that often require a jurisdictional determination from the Army Corps of Engineers (Corps) before proceeding. Any change in CWA regulations that would change the scope of federal jurisdiction will have a substantial effect on our members' ability perform routine agricultural functions and produce food and fiber for our state and nation.

Utah Farm Bureau and its 28,000 member families scattered across every county in the state of Utah urges the agencies not to finalize this flawed proposed rule which would fundamentally change the scope of the CWA, radically expand the agencies' regulatory powers and adversely impact routine agricultural practices.

**Proposed Rule Will Profoundly Affect Everyday Farming and Ranching Activities**

Utah Farm Bureau is concerned that the proposed rulemaking related to "waters of the U.S." and associated definitions are overbroad and ambiguous, suffer from a variety of legal infirmities, and are not supported by the science. Contrary to the agencies' assertions, the proposed rule will lead to more confusion for regulators and the regulated community and will by no means establish the certainty or predictability the agencies claim. If the agencies are truly interested in clarity, they must meet with stakeholders to understand our concerns, gather further scientific evidence and revise the proposed rule accordingly. First and foremost, the agencies can withdraw the proposed rule and begin by recognizing the agencies have legal limitations to the reach of federal regulations, deferring to the principles embodied in "Federalism" and the regulatory relationship between the national government and the states and making a commitment to working with the states and stakeholders.

Farming and ranching are businesses dependent on water. Water and putting the sovereign waters of the state of Utah to beneficial use is recognized by law for growing farm crops and raising livestock. Utah's water flowing across the landscape in rivers and streams was immediately diverted by our pioneer ancestors to produce food to sustain them. In an arid state like Utah the waters were diverted to irrigate thirsty farmland and any excess was returned

to the stream for downstream use. These “return flows” are waters adjudicated by state authority and utilized by downstream farmers and ranchers as water rights. Those return flows, according to Region 8 EPA may actually be in violation of the CWA as proposed in the new rule based on how the water returns to the stream.

This jurisdictional expansion and potential regulatory impacts would be a disaster for Utah’s and America’s farmers and ranchers. Food producers need to apply pesticides, herbicides and other chemicals to protect their crops. On most farmlands across Utah, there are summer cloudbursts and thunderstorms where heavy amounts of rain is dropped. Additionally, in our arid climate, we use various means of irrigation from flowing water on open fields to drip irrigation systems. But it is extremely difficult to entirely avoid isolated small wetlands, ephemeral drainages (dry gullies), ditches and drains located on and around production fields when applying such products.

If low wet spots in fields or generally dry gullies which flow during occasional storm events or heavy snowmelt are defined as jurisdictional waters, a farmer without a permit discharging even an “act of God” accidental deposit of a pesticide or herbicide would be involved in an unlawful discharge triggering civil penalties of up to $37,500 per day.

The proposed rule offers none of the clarity or certainty the EPA Administrator guarantees and the marketing campaign promises, particularly as it relates to food producers. Instead, it creates confusion and risk where the agencies gain almost unlimited authority to regulate, at their discretion based and based on “best professional judgment,” any low spot where water collects – including common farm ditches, ephemeral drainages including common dry gullies scattered across the Utah landscape, agricultural or livestock watering ponds and isolated wetlands commonly located near farms and ranches and scattered across Utah and America. The proposed rule defines terms like “tributary” and adjacent” in ways that make it impossible for a typical Utah farmer or rancher to know what wet area on his or her private property will be deemed and claimed as “waters of the United States.” The proposed definitions are broad enough to give federal regulators and/or citizen plaintiffs plenty of room to claim these areas are subject the agency’s jurisdiction under the redefined CWA.

Because of the overreach and confusion of the proposed regulatory action, the Utah Farm Bureau calls on the agencies to fully withdraw the proposed rule redefining “waters of the United States” and expanding regulatory reach.

The Utah Farm Bureau Federation provides the following specific comments, observations and recommendations for your consideration:

**Inconsistent with Limits Set by Congress and Recognized by the Supreme Court, the Proposed Rule Results in Limitless Federal Authority.**

Without clear Congressional authorization, according to the Supreme Court of the United States (SCOTUS), federal agencies may not use their administrative authority to “alter the federal-state framework by permitting federal encroachment upon traditional state power.” In *Solid Waste Agency of Northern Cook County (SWANCC) vs. U.S. Army Corps of Engineers,*

531 U.S. 159 (2001) the Supreme Court in dramatic fashion established the legal limits on federal regulatory agencies authority and reach in relationship to Congressional intent:

> *"Where an administrative interpretation of a statute invokes the outer limits of Congress's power, we expect a clear indication that Congress intended that result. This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority.* ***This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon traditional state power. Unless Congress conveys its purpose clearly, it is not deemed to have significantly changed the federal-state balance.*** (Emphasis added)

In *Rapanos vs United States,* 547 U.S. 715 (2006), SCOTUS addressed the scope of the Clean Water Act and discharges into "navigable waters." The Act (Congress) defined navigable waters of the United State. In *Rapanos* the High Court rejected the position of the Army Corps of Engineers that its authority over water was essentially limitless under the Act. In *Rapanos* vs. United States, the Court clarified that the term "waters of the United States" includes only those "relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams,…oceans, rivers [and] lakes.'"

The 111th Congress was provided the opportunity to address the findings of SCOTUS and these two important decisions in S. 787, the "Clean Water Restoration Act." The Library of Congress' nonpartisan research analysis stated: The Clean Water Restoration Act reaffirms federal jurisdiction over all waters of the United States and overturns the decisions of the United States Supreme Court in SWANCC vs. Army Corps of Engineers and Rapanos vs. United States. The Act amends the Federal Water Pollution Control Act (commonly known as the Clean Water Act) to replace the term "navigable waters" that are subject to such Act with the term "waters of the United States," defined to mean **all waters** subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, and natural ponds, all tributaries of any such waters, and all impoundments of the foregoing. (Emphasis Added)

Congress failed to approve S. 787 therefore sending a clear and important message to federal regulatory agencies on the topic of replacing navigable waters with "waters of the United States" as it applies to the Clean Water Act. It is clear Congress does intend to change the Clean Water Act, redefine or expand the definition of waters of the United States nor to alter the important federal / state framework.

Justice Anthony Kennedy in *Rapanos* introduced the conflicting and confusing language "significant nexus" to "navigable water." While this term remains open to judicial interpretation, it has introduced considerable controversy, uncertainty and the opportunity for federal regulatory agencies to exceed the federal/state framework.

It is critical however to not allow the concurring Kennedy opinion and his controversial "significant nexus" reference to detract from the fundamental principles underscored by these two important Supreme Court rulings:

1. Federal agencies have limits in promulgating rules and regulations and should not "push the limit of Congressional authority nor alter the federal – state framework encroaching on traditional state powers.

2. Congress meant there to be limits on the federal regulatory powers of the Clean Water Act and its reach based on the definition of "navigable waters." Federal agencies do not have limitless powers to regulate the waters of the United States.

It is obvious that the agencies are seeking to regulate beyond what Congress intended by redefining "waters of the U.S." The argument that the agencies are "just clarifying the actions" of SCOTUS in *SWANCC vs Army Corps of Engineers* and *Rapanos vs United States* is clearly without merit or legal underpinning.

The agencies should withdraw in its entirety the proposed rulemaking and this attempt to redefine waters of the United States to expand federal regulatory reach.

Farm Bureau is concerned that under the proposed rule, the agencies' authority to assert regulatory jurisdiction is limitless. Where in the past, jurisdiction was based on a site-specific analysis, the proposed rule creates broad categories of waters that would now be considered jurisdictional by rule. For example, under the proposed rule, remote features on the landscape that carry only minor water volumes (*e.g.* ephemeral drainages, storm sewers and culverts, directional sheet flow during storm events, drain tiles, man-made drainage ditches, gullies and arroyos), would now automatically be subject to federal CWA jurisdiction.

In addition, the proposed rule claim waters and wetlands as jurisdictional for regulation if they are but "located within the riparian area or floodplain" of a traditional navigable water, interstate water, territorial sea, impoundment, or tributary, or if they have "a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water." The proposed rule does not provide limits for the extent of riparian areas or floodplains, but leaves it to the agencies' "best professional judgment" to determine the appropriate area or flood interval. The proposal also fails to provide the limits of "shallow subsurface hydrological connections" that can render a feature jurisdictional but instead again leaves this critical analysis to the best professional judgment of the agencies.

Instead of providing clarity and certainty, the proposed rule offers confusion and inevitable litigation. EPA's proposed rule establishes a reliance on undefined or vague terms and concepts like "landscape unit," "riparian areas," "flood plain" and "ordinary high water mark" as they are determined by these agencies "best professional judgment." All are easy targets for groups, sometimes radical environmental groups and activist judges to assail normal farming and ranching practices or to seek "sue and settle" outcomes.

Inconsistent with the limits established by Congress and recognized by the Supreme Court, the proposed rule creates sweeping jurisdiction based on connections under newly devised theories such as "any hydrological connection," the undefined "significant nexus,"

"aggregation," and expansive new definitions for key regulatory terms such as "tributary," "adjacent waters," and "other waters." Through use of the broad definition of "tributary" the agencies will extend jurisdiction to any channelized feature, (*e.g.*, ditches, ephemeral drainages, stormwater conveyances), wetland, lake or pond that directly or indirectly contributes flow to navigable waters, without any consideration of the duration or frequency of flow or proximity to navigable waters.

The rule also proposes to expand "adjacent waters," to include any wetland, water, or feature located in a yet to be defined floodplain or riparian area, or that has a particularly nebulas sub-surface hydrologic connection to navigable waters. The new catch-all "other waters" category would include isolated waters and wetlands that, when aggregated with all other wetlands and waters in the entire watershed, have a "more than speculative or insubstantial" effect on traditional navigable waters. Under the proposed rule, ditches, groundwater and erosional features (*i.e.*, gullies, rills, and swales) can serve as a subsurface hydrological connection that would render said feature a jurisdictional "adjacent water" or demonstrate that a feature has a "significant nexus" and is therefore a jurisdictional "other water."

Such far-reaching jurisdiction over features far from navigable waters and carrying only minor or intermittent volumes of flow was not what Congress intended and goes far beyond even the broadest interpretation of SCOTUS in both the *SWANCC* and *Rapanos* decisions.

**Rather than Providing Clarity or Predictability, the Proposed Rule Provides Potential Limitless Jurisdiction**

The agencies stated goal for the proposed rule is to provide "clarity" and reduce confusion, red tape and uncertainty allegedly caused by the Supreme Court over what waters are jurisdictional. This proposal clarifies only that the agencies could regulate almost any low spot on a farmer's field or rancher's pasture where water sometimes stands or channels. The reality is, the proposal would categorically regulate as "navigable waters" countless ephemeral drainages, ditches, and other features across the landscape that are wet solely from rain or snow and may be miles from the nearest currently defined "navigable" water. The proposed rule also reaches to small, remote "wetlands" which may be nothing more than a low spot on the landscape, but happens to be near a newly defined jurisdictional ditch or ephemeral.

The proposed rule increases the level of uncertainty to farmers and ranchers exposing them to unknowing violations of law where they might farm in, or discharge typical farm nutrients or approved chemicals into geographic features that look like land. Not a newly defined regulated water feature. Because farmers and ranchers can be liable for major criminal and civil fines and/or jail time for unlawful discharges into "navigable waters," America's food producers must have clarity and the ability to understand how the terms apply to their land. And where clarity and certainty go out the door with "best professional judgment" thereby increasing the potential for conflict with common farming and ranching practices.

The agencies provide an incomplete description of the waters they intend to regulate under the expanded definition of WOTUS. As the EPA has gone about its marketing campaign, including Utah Farm Bureau's meeting with Region 8 EPA representatives, the representations

of flowing rivers, streams and marshes teeming with wildlife seem to bear no resemblance to the features on Utah's farms and ranches. These waters seem to ignore the majority of features the agencies are seeking to regulate as "tributaries," wetlands and ponds. They neglect to inform about typical features on Utah farms and ranches like low areas that gain wetland characteristics due to common irrigation practices. In arid Utah, irrigation ditches and channels are commonplace across the landscape, but because they have wetlands nearby or occasionally flow into jurisdictional ephemerals, common farming practices that will be open to regulation and the new "best professional judgment" standard.

Justice Kennedy's "significant nexus" is the lynchpin of confusion while at the same time the foundation of the agencies proposed rule. The rule however, provides no metrics or criteria for how to measure "significant" nor the "significance" of the impacts. In addition, the proposed rule identifies factors that could be evidence of significant nexus, without providing guidance on when the presence of the identified factors rise to a level of significance. Therefore, the suggestion must be that merely the presence of any of a long list of factors in and of itself is adequate to establish the Kennedy "significant nexus" standard.

For farmers and ranchers, uncertainty is increased through overly broad or nebulas terms in the propose rule including:

- certain features are to be considered jurisdictional based on their relationship to "impoundments" while leaving "impoundment" undefined,
- using the confusing and SCOTUS-panned concept of ordinary high water mark (OHWM) as the key identifier for tributaries,
- extending the concept of "adjacency" to non-wetlands without providing a limit to "waters" that can be considered adjacent,
- relying on vague and undefined concepts such as "floodplain," "riparian area," and "shallow subsurface hydrologic connection" to identify "adjacent waters,"
- providing an avenue for bureaucratic bias in regulatory determinations through "best professional judgment."
- according "interstate waters" the same status as traditional navigable waters while failing to provide a definition of "interstate waters,"
- creating exemptions for certain ditches, but making the exemptions so narrow that few ditches can meet the criteria, and
- allowing for exempted features, such as groundwater, gullies, and rills to serve as connections that can render a feature a jurisdictional "adjacent water" or "other water."

These are but a few examples of the ambiguity and uncertainty created by the proposed rule. Unfortunately each of these examples fails to provide the necessary clarity upon which EPA Administrator McCarthy proclaimed in attempting to delay agriculture's growing list of concerns. It becomes more apparent that the certainty the Administrator portrays is a certainty that the regulatory program will instead cause regulatory confusion, inconsistency, and litigation.

**The Proposed Rule's Categories of Jurisdiction and Associated Definitions Will Have Problematic Implications for Utah Farm Bureau members**

1. The Definition of "Tributary":

The definition of "tributary" is one of the most expansive and problematic terms in the proposed rule. Commonly understood, a tributary is a "stream" or "river" flowing into a larger stream or river. Only would the regulatory mindset of EPA include ephemeral drainages that only channel stormwater after heavy storms in the definition of a tributary. We all recognize and understand that ephemerals are gullies or arroyos dry most of the time – not flowing rivers or streams based on a common sense or dictionary understanding.

The agencies however seek expand regulatory reach by redefining as "tributaries these small, flow infrequently, or located some distance from the nearest (a)(1) through (a)(4) water, e.g., headwater perennial, intermittent, and ephemeral tributaries" are nevertheless part of the tributary to be network regulated by this proposal. Fed. Reg. at 22, 206.

The agencies have proposed an overly broad definition of "tributary" focusing on the presence of a bed, bank, ordinary high water mark (OHWM) and any minimum amount of flow that eventually reaches directly or through a number of potential pathways to a creek or stream that in turn ultimately reaches a traditional navigable water. The agencies assert that the upper limit of the tributary "is established where the channel begins." This concept is difficult for the Corps to determine, let alone a typical farmer or rancher.

In Utah, with heavy springtime melting snow packs and occasional torrential summer rainstorms the agencies using erosion and OHWM as an indicator of regulatory reach is simply outrageous! The "ordinary high water mark" is a term that encompasses any physical sign of water flow, such as changes in soil, vegetation or debris. Whenever snowmelt or rainwater flows through any path on the land, it leaves a mark – even if the flows are infrequent.

It is instructive that the agencies claim the proposed rules are faithful to SCOTUS and its decisions – however SCOTUS chastised the agencies for using the OHWM indicator. The plurality opinion in *Rapanos vs. United States* criticized use of the OHWM as an indicator of jurisdiction because it "extended the waters of the United States to virtually any land feature over which rainwater or drainage passes and leaves a visible mark – even if only the presence of litter or debris." 547 U.S 715, 725 (2006)

Even Justice Kennedy in his concurring judgment disparaged the OHWM as providing "no such assurance" of a reliable standard for determining a significant nexus. With such

uncertainty, how can a farmer or rancher know if a particular channel is an unregulated erosional feature or a jurisdictional regulated ephemeral tributary?



There certainly is some irony in the WOTUS rulemaking. On the one hand the agencies are embracing Justice Kennedy's vague and legally unsettling "significant nexus" as a means for justifying the proposed regulatory expansion over lands and waters. But the agencies fail to take note that Justice Kennedy scolded the Corps for arguing that the OHWM is an appropriate standard for determining that tributaries are "waters of the U.S."

The proposed rule's "tributary" definition, vastly expands the scope of features that are currently regulated as tributaries, extending jurisdiction to features like ephemeral drainages and storm water conveyances that have not been and should not be jurisdictional.

By failing to clarify, the agencies are forcing farmers and ranchers to:

- presume that an ephemeral drainage that carries water only when it rains is a jurisdictional tributary; or
- seek a jurisdictional determination from the Army Corps of Engineers; or
- take a chance that their ordinary agriculture practices near or located in such features may result in unlawful discharges carrying civil penalties of up to $37,500 a day. Even worse, a food producer could face criminal liability and jail time and up to $100,000 a day in fines.

These stiff penalties could mean loss on one's personal freedom or liberty. Farmers and ranchers deserve more clarify and greater certainty.

2. Ditches and Conveyances:

Under the proposed rule, nearly every ditch could be regulated as a tributary. There is no current definition under WOTUS that includes ditches. In fact the CWA does not define ditches as "waters of the United States", but as "point sources" that may discharge to "waters of the United States." (33 U.S.C. Section 1362(14)) Nevertheless, regulatory creep has led to agencies "informally" interpreting those regulations sometimes include ditches as "tributaries" on a case by case basis.

The Nephi City "Salt Creek" case is instructive. When the city of Nephi Utah was settled by Mormon Pioneers in 1857, the waters of Salt Creek were diverted to the city to raise crops and livestock. The irrigation channel was maintained as the city grew providing water to farms located west of the city. For more than 100 years, Nephi Irrigation Company delivered water through an open irrigation channel that flowed through the city to the farm fields. In 2007, when Nephi Irrigation proposed piping the water through town and burying the irrigation channel, citizens petitioned the state and Army Corps of Engineers to designate the "old irrigation system" as a "natural stream." Utah Farm Bureau in a public townhall meeting challenged the authority of the agency to make such a determination based on the *Rapanos* decision and the irrigation waters not having a connection to navigable waters. In a public meeting, the agency

asserted that *Rapanos* has no bearing on Corps' decisions in this jurisdictional matter. Later, in a letter to Nephi City, the Corps "asserted jurisdiction" over a 160 year old irrigation ditch from the diversion at Salt Creek to the point the water enters the underground laterals in place to irrigate nearby farm fields.



This example of an agency claiming jurisdiction over a historic irrigation system and its ditches proclaiming it a "natural stream" clearly shows the agency's willingness to disregard the standards and limits set in *Rapanos.* The Corps had already established the expanded, regulatory overreaching definition of a "tributary" – ignoring *Rapanos* as the proposed rule does.

In marketing the proposed rule, the agencies repeatedly insist the rule does not expand jurisdiction over ditches, that most ditches will not be regulated, that ditches are excluded and that the agencies do not intend to regulate ditches. Reality and the fine print in the proposed rule suggests otherwise! For the first time, the text of the agencies proposed rule in fact defines the term "tributary" to include "ditches" and "canals." The proposed rule would categorically regulate as "tributaries" virtually all ditches that ever carry any amount of water that eventually flows, over any distance and through any number of ditches, to a navigable water.

It must be noted that the proposed rule, for the first time, includes a category of excluded ditches in the regulatory text. However the exclusions are so narrowly defined that many farm ditches will not fall within the two categories the agencies so generously provided. The agencies limit excluded ditches to those with less than a perennial flow and that are excavated wholly in uplands and drain only in uplands. Relatively few ditches would qualify for this narrow exemption.

3. Regulation of All Adjacent Waters:

Many more waters will become jurisdictional under the new and expanded "adjacent waters" category. While the agencies claim the proposed rule does not seek to regulate any "new" categories of water – the entirely new category of "adjacent waters" suggests this assertion is patently false!

The agencies justify this misleading "no change" statement, claiming that prior to the High Court decision in *SWANCC*, the agencies asserted jurisdiction over adjacent waters as "other waters." This may be true, but the *SWANCC* Court decision rejected the agencies assertion and regulation of these isolated waters determining they are beyond the scope of their CWA authority.

The agencies broadly define "adjacent" as "neighboring'" which includes features located in the "riparian area" or "floodplain" of any other jurisdictional water, or feature with a "shallow subsurface…or confined surface hydrologic connection." Under this definition, it is difficult to envision any waters near tributaries, including dry ephemerals, or a coast that are not potentially within the scope of the federal jurisdiction. Additionally, ditches in areas with expanded definitional riparian areas or floodplains around them possessing potential "hydrological connections" likely become jurisdictional based on the agency's interpretation of the proposed rule.

The broad and overreaching concept of “adjacency” would impose virtually no limit on federal jurisdiction. Despite the fact Congress failed to enact the Clean Water Restoration Act and SCOTUS in *Rapanos* rejected the expanded definition of “waters of the U.S.” - the agencies embraced the overreach then and are seeking its obvious expansion in the proposed rule.


Complicating this adjacency issue for America’s farmers and ranchers is the inclusion a water feature as jurisdictional will likely now be decided at the whim of a regulator’s “best professional judgment.” The agencies admit there is no scientific consensus over which floodplain interval is appropriate. The agencies cannot categorically determine all waters in an unknown floodplain have a significant nexus to navigable waters and therefore are “navigable waters.” Whether the agencies seek to assign a single floodplain interval nationwide or on a water by water basis, the decision is essentially arbitrary. Farmers and ranchers would face uncertainty and the potential for regulatory action based on whether water on their agriculture lands will be deemed jurisdictional under this scenario.

4. Other Waters:

For those “other waters” that are not categorized as “tributary” or “adjacent” waters, such as isolated ponds or wetlands would nevertheless impose jurisdiction based on a significant nexus to waters of the U.S. These possibilities are so broad and far reaching, the agencies will have no trouble finding a significant nexus for even the most minor wet spots.

As an example, the case of isolated livestock watering ponds, on private rangelands or approved for use on federally managed public rangelands in place to hold rainwater could be claimed as jurisdictional according to Region 8 EPA. During a presentation from EPA on WOTUS, this previously exempted practice may fall under EPA regulation. Stock water ponds are in place across Utah to hold melting show and summer rains. However, in the event of a major thunderstorm or fast snowmelt, water may overflow the stock pond and enter a nearby gully that is commonly dry. The volume of the water from the event pushes water from the stock pond down the gully and into a newly categorized “jurisdictional tributary.” This commonly occurring overflow on an isolated stock water pond and escaped water entering a newly defined “adjacent” water and ephemeral drainage feature (dry gully) illustrates the potential of the expanded reach. Water which is far from any currently regulated CWA navigable water and the SCOTUS definition of WOTUS.

The possibilities are so numerous and broad that “best professional judgment” of the agency will allow regulators no difficulty in finding the necessary “significant nexus” for most if not all naturally occurring water flows or minor wet spots. Ranchers would be hounded by regulators where water escapes stock water ponds or other common food production activities and enters even a dry gully (ephemeral drainage) and may or may not enter a jurisdictional water of the U.S. This determination to be made based on the “best professional judgment” of the agencies!

**USDA Natural Resources Conservation Service (NRCS)**

Recently at a meeting with the Utah Office of USDA’s NRCS in Salt Lake City the topic of EPA’s proposed rulemaking and redefining of WOTUS was on the agenda. The meeting included a call in by Region 8 EPA officials specifically to address questions and concerns related to the proposed rule.

Utah Farm Bureau is a member of the Utah State Technical Advisory Committee (STAC) established to coordinate messaging and opportunities between the federal agency and Utah's farmers and ranchers. As that meeting moved to a discussion of EPA and WOTUS, the Region 8 participants pointed out that in the rule the agency is exempting 56 agriculture practices. Farm Bureau immediately noted that the CWA already exempts common agriculture practices and WOTUS


does not put a number on them. The often talked about EPA exemption was unnecessary unless the agencies have some other motive.

As the discussion progressed, Farm Bureau expressed concerns that the only way the proposed 56 "exempted" practices would be recognized by EPA is if they were implemented on farms and ranches incorporating the NRCS guidelines. Questions concerning why EPA would need to further define "common farming practices" and recognition Congress never intended to narrowly define them was discussed. Region 8 EPA offered no explanation.

But of greatest concern seemed to be the EPA pulling the NRCS into its expanded regulatory scheme.

Utah Farm Bureau expressed a number of questions and concerns that were not given satisfactory answers:

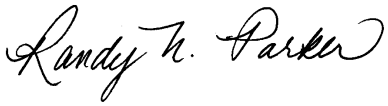
- Not all food producers are engaged with NRCS and therefore do not know they have "guidance" for food production practices some as common as brush control and fencing.
- Will the NRCS standards become a regulatory standard if the proposed rule is adopted?
- Would EPA compel NRCS staff to be witnesses and testify against farmers and ranchers based on failing to meet standards?
- Would NRCS be compelled to assume a role in implementing or enforcing EPA's proposed WOTUS?
- What will be the relationship between EPA and NRCS and will it affect their relationship with farmers and ranchers?
- Does NRCS agree to becoming a regulatory arm of the EPA – giving up its historic voluntary, incentive-based relationship with farmers and ranchers?

**Conclusion**

The Utah Farm Bureau Federation, for the foregoing reasons, asked the agencies to withdraw the proposed rule and begin a real dialog with the states and stakeholders. Congress set limits on regulatory agencies based on the CWA and navigable waters. Congress set a clear message by not passing the "Clean Water Restoration Act" and the expanded definition of "waters of the U.S." SCOTUS in both SWANCC and Rapanos underscored the limits placed on federal regulatory agencies in promulgating rules and regulations. The proposed rule would undermine the Constitutional limits of the national government in its dealings with the sovereign states of the United States.

Congress did not give the agencies the authority, and they may not take what Congress did not give. Thank you for considering these comments.

Sincerely,



Randy N. Parker
Chief Executive Officer



CC:
The Honorable Gary Herbert, Governor of Utah
The Honorable Orrin Hatch, United States Senator
The Honorable Mike Lee, United States Senator
The Honorable Rob Bishop, United States Representative
The Honorable Jim Matheson, United States Representative
The Honorable Jason Chaffetz, United States Representative
The Honorable Chris Stewart, United States Representative
The Honorable Tom McClintock, United States Representative
Ms. Luann Adams, Utah Commissioner of Agriculture and Food
Mr. Mike Styler, Utah Department of Natural Resources Executive Director
Ms. Kathleen Clarke, Utah Public Lands Coordinating Office
Ms. Margaret Dayton, Utah State Senate
Mr. Mike Noel, Utah State House of Representatives